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Think twice before releasing control of condo association

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In 2008, House Bill 995 amended the transfer of condominium association control provisions of Chapter 718, the Florida Condominium Act, by adding the following events as causes for the trigger of transfer of control of the association to unit owners other than the developer:

■ When a developer files a petition seeking protection in bankruptcy; or


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■ When a receiver is appointed for the developer by a circuit court and is not discharged within 30 days after such appointment.

This amendment was important due to the fact that control over the association is a key asset for the developer during the early years of development of a condominium, and particularly during tough economic times.

During the developer control period, the developer holds the power to control the operation, maintenance and direction of the condominium association. Most notably, this power enables the developer to hire the management company, set the budget, control the rules and regulations of the condominium and avoid payment of assessments for those units that remain unsold, so long as a developer guarantee is in place.

Once turnover has occurred, it cannot be reversed, even if the developer still holds a majority of the condominium units. As a result, it is usually important to a developer to retain control of the association for as long as legally possible.

With the recent economic downturn, many condominiums have been faced with the reality of developer bankruptcy or the appointment of a receiver. With developers struggling to stay financially afloat, and owners clamoring for increased control of the condominium association, many developers faced with bankruptcy or the appointment of a receiver have been confronted with requests from owners (and counsel for the owners' association) to transfer control of the association to the owners, citing as authority the recent amendments to Section 718.301, Florida Statutes, set forth above.


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Many developers have unknowingly turned over control of the association, assuming they were required to do so pursuant to the amendments in HB 995. However, unbeknownst to the developer or the developer's lender, turnover may not have always been required.

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A developer who has filed bankruptcy or has had a receiver appointed that has not been discharged within 30 days should consider the following questions prior to transferring control of the association:

■ When was the declaration recorded?

Generally, the law governing a condominium is the law in existence on the date of recording of the declaration of condominium. Further, the declaration of condominium typically contains a provision that fixes the date of interpretation of the Condominium Act as it pertains to that condominium (more on this below.) As a result, a condominium for which the declaration was recorded prior to Oct. 1, 2008, (the date upon which HB 995 took effect) would not be subject to this amendment to the Condominium Act, unless the legislature, in the text of the statute, clearly indicated that the amendment was to apply retroactively.

In the case of HB 995, there is no expressed legislative intent that the amendment was intended to apply to condominiums in existence before the law became effective.

■ Is the amendment to 718.301 remedial or procedural, so as to allow retroactive operation of the amendment?

Generally, the retroactive application of subsequent legislation is disfavored by courts. However, remedial statutes, or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance or confirmation of rights already existing, are allowed to operate retroactively in certain cases.

The question then becomes whether the right to control the board of directors of a condominium association a "vested" right? Based on case law in Florida, it appears that it is. Previous decisions have shown that the right to control the board of directors of an association is a vested property right that is not in the nature of a right affecting only procedures, and that the rights of developer would be substantially impaired by a retroactive application of a statutory amendment which limits or denies a developer control over the association.

■ Does your declaration contain an automatic amendment clause?

Notwithstanding the above, future legislative acts may be incorporated as amendments to the original recorded declaration of condominium if the declaration contains express language referring to or defining the Condominium Act as Chapter 718, Florida Statutes, "as it may be amended from time to time."

A declaration containing this "automatic amendment language" subjects the condominium to the application of all subsequent amendments to the Condominium Act, thus avoiding the general rule against retroactive application of statutes. As a result, only a declaration that fixes the date of interpretation of the Condominium Act "as of the date of recording of the declaration" will put the developer and its lender in the position to avoid this turnover provision.

Control over the association can, in many cases, help to keep a condominium and the developer afloat during tough economic times. Again, once transfer of control has occurred, it cannot be reversed. As a result, troubled developers and their lenders faced with bankruptcy or the appointment of a receiver for a condominium should consult with experienced counsel prior to commencing the transfer of association control.

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